

ETHICAL OBLIGATIONS IN CASES INVOLVING DOMESTIC VIOLENCE



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SCREEN FOR DOMESTIC VIOLENCE!

- But how can I screen for domestic violence if I do not properly understand it?
- Montana Rule of Professional Conduct 1.1:
A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

WHAT IS DOMESTIC VIOLENCE?

- A pattern of behavior where one partner uses physical violence, coercion, threats, intimidation, isolation, emotional, sexual, or economic abuse to control their current or former partner.
- Abusiveness has little to do with psychological problems and everything to do with values and beliefs.
- Common misperceptions about DV are pervasive in society and must continually be addressed in justice system.

A BRIEF LEGAL HISTORY OF GENDER-BASED DOMESTIC VIOLENCE

- Until well into the 1800s, it was expressly legal for a man in the English-speaking world to physically abuse his wife. She had no recourse to the police or the courts.
- If she chose to divorce her husband because of his abusiveness, he was legally entitled to custody of their children.
- In the late nineteenth century, some legal consequences were finally legislated in the U.S., but rarely enforced until the 1970s (and not enforced consistently until the 1990s).
- Remember: this legal history plays an important role in shaping today's cultural views among males—and females—about the abuse of women.
- It will likely take generations to overcome the accumulated impact of hundreds of years of destructive social attitudes towards women.*

*LUNDY BANCROFT, WHY DOES HE DO THAT? INSIDE THE MINDS OF ANGRY AND CONTROLLING MEN, pp. 320-321 (2002)

DOMESTIC VIOLENCE: WHAT IS IT NOT?

- NOT just physical abuse. It is a PATTERN of coercive control.
- NOT a one-time incident. It is ongoing power and control.
- NOT about conflict. It is about a need to control and dominate.
- NOT caused by substance abuse or mental health illnesses.
- NOT an anger management problem.
- Oregon Judge's opinion piece on DV:
http://www.oregonlive.com/opinion/index.ssf/2014/11/heartsick_elias-case_judge_tak.html

ETHICAL OBLIGATIONS

- You have an ethical obligation to know whether you are representing a victim or a batterer.
- ABA Standards of Practice for Lawyers Representing Victims of Domestic Violence, Sexual Assault and Stalking.
- Margaret Drew, *Lawyer and Malpractice and Domestic Violence: Are We Revictimizing Our Clients?* 39 Fam. L.Q. 7 (2005).
 - “Failure to recognize when a client or opposing party is or has been abused by a partner and failure to consider abuse in making strategic decision are forms of legal malpractice.” Drew, 39 Fam. L. Q. 7, at 7.

SCREENING TIPS TO DETERMINE IF YOUR CLIENT IS A VICTIM OF DOMESTIC VIOLENCE:

- Conversation with client, preferably alone
- If translation services are needed, do not use family or friends to interpret
- Different clients may respond better to different approaches (oral, written, etc.)
- Intake questionnaire alone may not be enough to properly screen
- Frame your questions in a way that does not shame, embarrass or single out the client
- Explain confidentiality and attorney-client privilege to the client

EXAMPLE SCREENING QUESTIONS

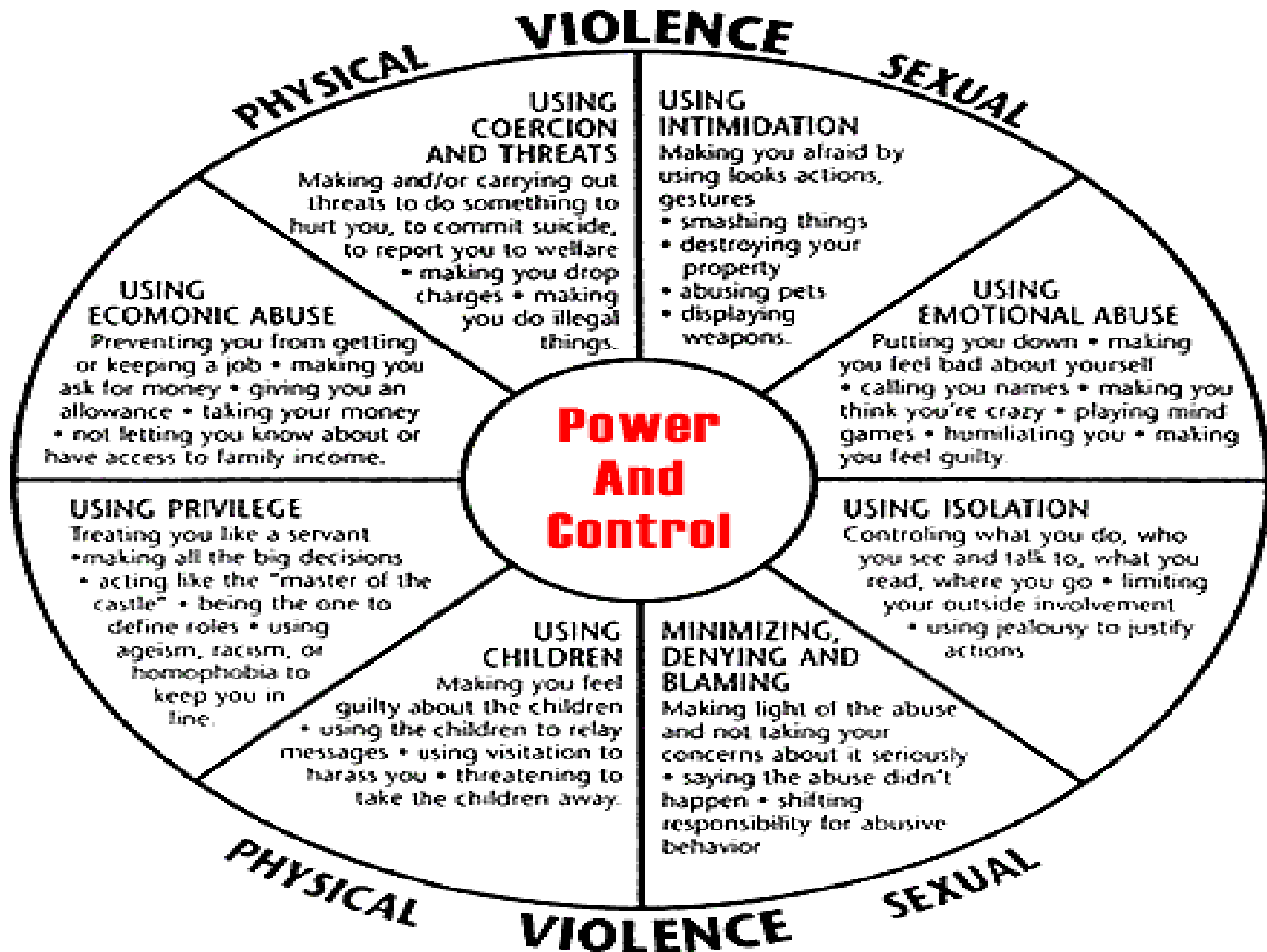
- Examples of screening questions to ask during initial client meeting:
 - “Has your intimate partner ever hurt or threatened you?”
 - “Do you feel safe in your home?”
 - “Has your partner ever threatened to never let you see your children again?”
 - “Does your partner ever force you to do things that you do not want to do?”
 - “Does your partner control your access to money?”
 - “Does your partner call you names?”
 - “Does your partner ever prevent you from sleeping, eating, or leaving your home?”

SCREENING TIPS TO DETERMINE IF YOUR CLIENT IS A BATTERER

- **Montana Rule of Professional Conduct 2.1: Advisor.** In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.
- Attorney could ask screening questions for victims in the inverse, but commonly batterers will deny engaging in abusive behaviors.
- If client does admit to engage in abusive behavior, but justifies that behavior by placing blame on victim, attorney should be aware that he/she is likely representing a batterer.
- Other indications might include:
 - Client insisting that attorney file numerous and frivolous motions
 - Client requesting primary parenting of the children when client has not been historically involved as a parent.

OTHER TIPS FOR SCREENING FOR ABUSIVE BEHAVIORS

- Become familiar with batterers' excuses for their behavior:
 - *Minimizing*: "I only pushed her." "She bruises easily." "She exaggerates."
 - *Citing good intentions*: "She gets hysterical so I have to slap her to calm her down." "I have to keep her in line."
 - *Use of alcohol and drugs*: "I'm not myself when I drink."
 - *Claiming loss of control*: "Something snapped." "I can only take so much." "I was so angry, I didn't know what I was doing."
 - *Blaming the partner*: "She drove me to it." "She really knows how to get to me."
 - *Blaming someone or something else*: "I was raised that way." "My probation officer is putting a lot of pressure on me." "I've been out of work."
- Don't be manipulated or misled by excuses
- Identify violence as a problem and hold the client responsible for his actions.
- Be careful to provide competent representation while not encouraging abusive behaviors.



LETHALITY FACTORS AND ASSESSMENTS

- Domestic violence lethality factors are used to assess whether a victim is at an increased risk for extreme danger or homicide.
- Lethality assessments are not necessarily predictive, but when you see certain factors clumped together, you should advise your client that there is an increased risk of danger and even homicide.
- Examples of DV lethality factors include: strangulation, forced sex, threats to kill/maim pets, stalking, threats to use weapons or using weapons against victim, constant and irrational jealousy, and abuse during pregnancy.
- Listen for lethality factors when meeting with your client.

TOOLS FOR PROPERLY SCREENING FOR DOMESTIC VIOLENCE

Jacquelyn C. Campbell, PhD, RN

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Several risk factors have been associated with increased risk of homicides (murders) of women and men in violent relationships. We cannot predict what will happen in your case, but we would like you to be aware of the danger of homicide in situations of abuse and for you to see how many of the risk factors apply to your situation.

Mark Yes or No for each of the following:

- 1. Has the physical violence increased in severity or frequency over the past year?
- 2. Does he own a gun?
- 3. Have you left him after living together during the past year?
- 4. Is he unemployed?
- 5. Has he ever used a weapon against you or threatened you with a lethal weapon?
(If yes, was the weapon a gun? ----)
- 6. Does he threaten to kill you?
- 7. Has he avoided being arrested for domestic violence?
- 8. Do you have a child that is not his?
- 9. Has he ever forced you to have sex when you told him no or did not wish to do so?
 - 10. Does he ever try to strangle/choke you?
 - 11. Does he use illegal drugs?
 - 12. Is he an alcoholic or problem drinker?
 - 13. Does he control most or all of your daily activities? For instance: does he tell you who you can be friends with, when you can see your family, how much money you can use, or when you can take the car? (If he tries, but you do not let him, check here: ----)
- 14. Is he violently and constantly jealous of you? (For instance, does he say "If I can't have you, no one can")
- 15. Does he follow or spy on you, leave threatening texts or messages, destroys your property?
- 16. Have you ever been beaten by him while you were pregnant? (If you have been pregnant by him, check here: ----)
- 17. Have you ever threatened or tried to commit suicide?
- 18. Has he ever threatened or tried to commit suicide?
- 19. Does he threaten to harm your children?

HOW EXACTLY DOES THE PRESENCE OF DOMESTIC VIOLENCE AFFECT MY ETHICAL OBLIGATIONS?

■ Safety planning:

- Awareness of when safety risks escalate (separation, service of legal documents, etc.)
- Refer to advocacy organization if necessary

■ Understanding of best practices and common misconceptions:

- Anger management inappropriate, batterer's intervention appropriate
- Substance abuse a separate and distinct problem
- Effects of childhood exposure to domestic violence
 - Expert testimony can be critically important to address common misconceptions

■ Parenting Plans and “Best Interest of the Child” factors:

- Effects of childhood exposure to domestic violence

■ Distribution of assets:

- What is an equitable division of assets in a case involving domestic violence?

■ Alimony:

- Abuse-related injuries affecting ability to work?

■ Mediation:

- Informed consent requirements under Montana Code Annotated

DOMESTIC VIOLENCE AND MEDIATION

- *Hendershott v. Westphal*, 360 Mont. 66, 74 (2011).
 - Holding: in family law proceedings, district courts are explicitly prohibited from authorizing or continuing mediation where there is a reason to suspect emotional, physical, or sexual abuse.
- 2013 House Bill 555 changed Montana Code Annotated §40-4-301 to allow victims to opt-in to mediation:
 - “Unless each of the parties provides written, informed consent, the court may not authorize or permit continuation of mediated negotiations if the court has reason to suspect that one of the parties or a child of a party has been physically, sexually, or emotionally abused by the other party. A mediation conducted under this subsection may be conducted by a mediator who is trained in mediating domestic violence cases.” M.C.A. § 40-4-301(1).

SAFETY PLANNING AS AN ETHICAL OBLIGATION

- At the heart of domestic violence practice is safety planning.
- At each stage of the litigation the attorney and the client must discuss whether or not a certain action, inaction, or strategy raises or decreases the risk of abuse to the client and other family members.
- Safety planning does not begin or end with obtaining a civil protection order.
 - For example, one must consider whether or not it is safe for the client to seek such an order.
 - What plan does your client have to minimize her risk of abuse?
 - What resources does your client have available to her should the partner or former partner attempt further abuse of her or the children?
 - What referrals has the lawyer's office made to provide the client with assistance on safety issues?

CASE SCENARIO

Monica needs representation in a divorce and parenting action. At your initial consult, Monica tells you:

- She has been married to Joe for 7 years and they have one son, Avery, age 5. Monica believes that Joe is a good dad to Avery, but she is scared for her own safety.
- During their relationship, Joe controlled their money. They had a joint checking account, but Joe wouldn't allow Monica to take money out of the account. He did give her a weekly allowance so she could buy groceries for the family, but she had to account for every penny spent.
- Joe did not allow Monica to work much during their relationship, even though she has a teaching degree. Early in the marriage, Joe made Monica quit her job because he thought she spent too much time talking to the male principal.
- When you ask Monica what really scared her the most about Joe, she tells you when Joe was really angry at her, he would make her sit at one end of the table while he cleaned his rifle at the other end of the table. Even though Joe never threatened her with the gun, she knew that she needed to do whatever Joe wanted.

QUESTION PRESENTED:

With the facts Monica has given you, do you conclude that domestic violence is present in this case?

Why or why not?

What ethical obligations might be implicated in this case scenario?

SHIFTING TOPICS:

A BRIEF LOOK AT DOMESTIC AND SEXUAL VIOLENCE IN INDIAN COUNTRY

- Native populations are disproportionately impacted by domestic and sexual violence—why?
- Vast majority of sexual violence in U.S. is intraracial (victims are usually attacked by perpetrators of their own race), but among Native victims of domestic and sexual violence, perpetrators are generally non-Native. What explains this anomaly in criminology?
 - More than half (56.1 percent) of AIAN women have experienced sexual violence in their lifetimes and almost all of them (96 percent) have experienced sexual violence perpetrated by someone not of their own race. Among AIAN men, 1 in 4 has experienced sexual violence in their lifetimes. Again, almost all (89 percent) have experienced sexual violence committed by a person not of their race.*
- Jurisdictional gaps, tribal courts stripped of authority to punish non-tribal perpetrators, inadequate law enforcement resources.

*“Violence Against American Indian and Alaska Native Women and Men: 2010 Findings from the National Intimate Partner and Sexual Violence Survey” conducted by Centers for Disease Control and Prevention.

PRE-COLONIAL TRIBAL LEGAL HISTORIES

- Native women had spiritual, political, and economic power that European women did not (women and children were not the property of men in tribal societies) (Sarah Deer, *The Beginning and End of Rape: Confronting Sexual Violence in Native America*, p. 18 (2015)).
- Pre-colonial tribal nations exercised full jurisdiction over crimes against women. (Deer at 22).
- In pre-colonial tribal societies, women were not considered “chattel” and sexual assault was considered a grave crime:
 - “Men who caused stress in the community or risk to the survival of the tribe by dishonoring women were held accountable by the people. They could not carry the sacred pipe, nor could they hold positions of status.” *Id.* at 22.
 - Some tribes banished rapists, others imposed corporal punishment and even the death penalty for crimes of sexual violence.
- In many tribal societies binary gender lines were fluid and without fixed boundaries (evidenced by the acceptance of Two-Spirit gender nonconforming people).

AMERICAN DV AND RAPE LAW VS. PRE-COLONIAL TRIBAL LEGAL TRADITIONS

- American rape law is based in large part on the common law of England, which treated women as subordinate at best and “chattel” (property) at worst. (Deer, p. 25).
- Origins of sexual assault law in America developed as an offshoot of property law—women were the property of fathers, then husbands. *Id.*
- Sexual assault against a woman was considered a trespass against the property of the husband or father, and DV was expressly legal until 1800s.
- Fundamentally opposed to pre-colonial tribal notions of dealing with domestic and sexual violence.

WHY ARE NATIVE WOMEN DISPROPORTIONATELY AFFECTED BY SEXUAL VIOLENCE TODAY?

- More than 1 in 3 American Indian and Alaska Native women will be raped in their lifetimes. 2 in 5 will be victims of domestic violence.
- Native women experience the trauma of rape as an enduring violence that spans generations. (Deer, p. xi).
- Sarah Deer argues that rape of Native women is not an epidemic of recent, mysterious origin—it is a fundamental result of colonialism, a history of violence reaching back centuries. (Deer, p. x).
- From 1978 until 2013, tribes were stripped of the authority to punish non-tribal perpetrators. Victims and tribes had to rely on federal (and in some cases state) government for prosecution of these cases on most reservations.
- Between 2007 and 2012, feds failed to prosecute 50% of alleged violent crimes on reservations, including 75% of alleged sex crimes.
- With the reauthorization of VAWA 2013, tribes are now able to prosecute non-Indian perpetrators of domestic violence against Native women in Indian country. Tribes are currently working to implement the provisions of VAWA 2013.

BUT WHAT ABOUT NON-NATIVE PERPETRATORS OF SEXUAL ASSAULT ON TRIBAL LANDS?

- VAWA 2013 does not extend to cases of rape outside the context of domestic violence with “sufficient ties” to the tribe.
- Tribes still lack jurisdiction over most acquaintance rape, all child sexual abuse, and all stranger rape committed by non-Indians.
- The only sexual assault that can be covered is that committed by an intimate partner.
- (Politically, Congress did not have the willpower to overturn all of *Oliphant* so it started by restoring jurisdiction over abusers who have become part of the community by entering into relationships with Native women).

Complex jurisdictional issues...

- Public Law 280: State of Montana has jurisdiction on Flathead Reservation rather than federal government.
- Confederated Salish and Kootenai Tribal Court generally has civil jurisdiction over any member of a federally recognized tribe residing on the Flathead Reservation.
- Concurrent state and tribal court jurisdiction over family law-related matters.
- Status of the perpetrator/abuser generally controls where case will be filed.



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